FROM 'CARRIES ON A BUSINESS' TO 'IN TRADE OR COMMERCE': EFFICIENCY IN GOVERNMENT OR SEMANTIC ENDEAVOUR?

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From 'carries on a business' to 'in trade or commerce': Efficiency in government or semantic endeavour?

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The Competition and Consumer Act 2010 (Cth) applies to the Crown in right of the Commonwealth, State and Territory governments, and local government, in so far as government 'carries on a business'. The Harper Review recommended amendment to apply the CCA instead to government in so far as it undertakes activity 'in trade or commerce'. This article examines this proposal, setting out the historical context in which the CCA has applied to government, reform processes, and current jurisprudence on the meaning of 'carries on a business'. It examines in detail the High Court's decision in ***NT Power Generation Pty Ltd v Power and Water Authority****, and finds that many activities of government, including some procurement, are currently subject to the CCA. The article reviews the interpretation of 'in trade or commerce' in existing provisions of the CCA and concludes that its meaning is unclear and that adoption of it in the context of the Crown may have unintended consequences. It considers Commerce Act 1986 (NZ) jurisprudence on which the Harper Review's recommendation was based and finds that 'engages in trade' in that context mainly distinguishes between the commercial and regulatory roles of government, has an additional sub-definition which expressly includes procurement, and appears to give NZ competition law a relatively narrow application to government. The article concludes by questioning whether the adoption of 'in trade or commerce' will extend the application of the CCA beyond the range of government conduct already captured, finding that more surgical changes may be appropriate.*

Introduction

Australia's governments at all levels have historically had a large role in the domestic economy[1] and continue to do so today.[2] However, government in a number of circumstances continues to enjoy Crown immunity.[3] This is particularly relevant to the application of the competition law, the *Competition and Consumer Act 2010* (Cth) ('*CCA*'). This article reviews the application of the *CCA* to government bodies entitled to Crown immunity across

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1 See Mark Leeming, 'The liabilities of Commonwealth and State governments under the Constitution' (2006) 27 *Australian Bar Review* 217, 218.

2 Eg, Organisation for Economic Co-operation and Development ('OECD') national accounts for 2007, 2009 and 2013 show that net Australian Government expenditure was, as a percentage of GDP, respectively, 34.6 per cent, 38.2 per cent and 36.6 per cent: see OECD, *Government at a Glance* (2015) ch 2 fig 2.28; cf John Daley, 'Budget repair and the size of Australia's government' (Paper presented at Melbourne Economic Forum, December 2015).

3 See *Bropho v Western Australia* (1990) 171 CLR 1 ('*Bropho*').

Commonwealth, State, Territory and local government in light of the Harper Review's proposed amendment (which was endorsed but not yet enacted by the government) which purported to broaden the test for application of the *CCA* to the Crown.[4] Currently, bodies entitled to Crown immunity are subject to the *CCA* in so far as the body 'carries on a business'. The proposed amendment substituted 'in trade or commerce' on the basis that the *CCA* should apply to 'all government activities that have a trading or commercial character'.[5] This article seeks to illuminate the discussion by assessing the current limitations of the *CCA* and the likely impact of the proposed amendment.

Part 1 outlines the history of the application of the *CCA* to government bodies entitled to Crown immunity. Part 2 discusses the at times contentious interpretation of the phrase 'carries on a business'.[6] What amounts to government carrying on a business was expanded by the High Court in *NT Power Generation Pty Ltd v Power and Water Authority*,[7] where it was established that once it is proved that government 'carries on a business', the core conduct of that business, such as the supply of goods or services, is subject to the *CCA*. The High Court also held that any conduct incidental to the core conduct of that business, such as procurement or leasing premises, is also subject to the *CCA*.[8] Procurement for non-commercial purposes, however, may be one instance of conduct which is not currently caught. A critical consideration in the case law has been the identification of conduct that is purely governmental in nature. Cases subsequent to *NT Power* suggest that governmental conduct 'involves the discharge of a statutory or regulatory obligation'.[9] This requires a finding on a question of law, providing a more precise test for determining what is exempt 'governmental' business.[10]

Part 3 discusses the proposals for reform. The Harper Review recommendation particularly noted the area of procurement, using 'the delivery of large infrastructure projects, or the regular requirements of the health or education systems' as examples of circumstances not currently caught.[11] The Harper Review considered that the amendment would expand the scope of application of the *CCA* to all other commercial transactions

4 Ian Harper et al, *Competition Policy Review: Final Report* (2015) Recommendation 24, 282 ('Harper Review').
5 Ibid 96.
6 Eg, see how the meaning is defined in *Hope v Bathurst City Council* (1980) 144 CLR 1, 9 ('*Hope*').
7 (2004) 219 CLR 90 ('*NT Power*').
8 Ibid 116–17 [66]–[67] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
9 For instances where such reasoning has been applied, see *RP Data Ltd v Queensland* (2007) 221 FCR 392, 415–17 [56]–[59] (Collier J) ('*RP Data*'); *Salvation Army (NSW) Property Trust v Commonwealth* (2015) 147 ALD 677, 685 [27] (Jagot J) ('*Salvation Army*'); *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2016) 337 ALR 573, 607–8 [180] (White J).
10 Here, 'question of law' is referred to in the context used by Mason J that 'the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law': see *Hope* (1980) 144 CLR 1, 7 (Mason J; Gibbs, Stephen, Murphy and Aickin JJ agreeing).
11 Harper Review, above n 4, 278.

undertaken by government bodies, including procurement and leasing of government-owned infrastructure.[12]

However, this article suggests that the prospects of the 'in trade or commerce' reform having such a predictable, broad, remedial effect are uncertain. This cautious view derives from the fact that the broad and general meaning that the phrase 'in trade or commerce' otherwise attracts is limited in the context of the *CCA* to those activities that are 'an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.[13]

The Harper recommendations were based, in part, on the *Commerce Act 1986* (NZ) approach, considered in Part 4. In New Zealand, competition law applies to government when government 'engages in trade', which has been construed to require an assessment of whether government activity is of a commercial or regulatory nature.[14] Importantly, however, 'trade' is expressly defined in both the *Commerce Act* and the *Fair Trading Act 1986* (NZ) ('*Fair Trading Act*') to specifically include activities that involve procurement.[15] The Harper Review did not recommend the inclusion of a similar definition.[16] A review of NZ case law indicates that findings of government activity subject to the *Commerce Act* or the *Fair Trading Act* are rare and little conduct in practice meets the threshold where government 'engages in trade'. In these circumstances there would appear to be questionable merit in relying on the NZ approach.

The article concludes in Part 6, finding that while the adoption of 'in trade or commerce' may lead to a slightly wider scope of government conduct being subject to Australia's competition laws, its ambit is likely to be uncertain. Moreover, there has been only limited indication of how the construction would differ from determining when government 'carries on a business'. Arguably, the defect identified by the Harper Review could be cured by more surgical amendment of the definition of 'business' in ss 2A, 2B and 2BA to include one-off transactions (such as leasing or restructuring) and procurement, capturing activity which remains outside the *CCA* following *NT Power* and which the Australian Competition and Consumer Commission ('ACCC') and the Harper Review found are currently beyond the scope of the *CCA*.

Part 1: Historical context to government economic intervention and the Crown immunity in Australia

The role of government in Australian markets has historically been very significant. Isolation of the country from Europe, small numbers of citizens, primitive conditions, patterns of settlement in coastal pockets, and the imperatives of development resulted in government involvement in activities

12 Ibid 281.

13 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 602–4 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Concrete Constructions*').

14 *Commerce Act 1986* (NZ) s 5(1); *Fair Trading Act 1986* (NZ) s 4(1); *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129 ('*Glaxo*').

15 *Commerce Act 1986* (NZ) s 2; *Fair Trading Act 1986* (NZ) s 2.

16 Harper Review, above n 4, app A.

which in Britain, for example, would have been the function of private enterprise or private and charitable organisations.[17] The colonial legislatures developed statutory remedies by which government could be held accountable despite attracting Crown immunity.[18] Australian colonies legislated to make the Crown legally liable at common law far earlier than was the case with other common law jurisdictions,[19] and Crown immunity in Australia has continually been challenged in light of the expansive role of governmental commercial activities. The High Court acknowledged the role that these historical considerations played in determining the scope and application of Crown immunity in *Bropho v Western Australia,*[20] and issues articulated there remain relevant today. Estimates suggest that if government functioned on a more commercial basis it could deliver efficiencies which are 'considerable ... perhaps as much as 20–25% where services have not been previously exposed to competition'.[21]

When the former competition law, the *Trade Practices Act 1974* (Cth) ('*TPA*'), was introduced, the jurisprudence dictated that Crown immunity of governments at Commonwealth, state and territory level prevailed in respect of statute law, with liability only arising by express words or necessary implication of a statute, and with legislative intention paramount.[22] However, over a period of 30 years, the *TPA* and the successor *CCA* were amended to progressively apply more broadly. These developments are described below.

The *CCA* currently applies to the Commonwealth under s 2A(1) 'in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth'.[23] Section 2A(2) provides that the *CCA* applies to the Commonwealth and each authority of the Commonwealth (whether or not acting as an agent of the Crown) as if such entities were corporations.

Section 2A was introduced to the *TPA* in 1977 following the recommendations of the Swanson Committee,[24] accepting submissions that arrangements between government authorities and private parties were not

17 See Paul Desmond Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987); Deborah Healey, 'Australian Experience with Competition Law: The State as a Market Actor' in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press, 2014) 205, 206, particularly in relation to Crown liability at common law and under statute.

18 *Pyrenees Shire Council v Day* (1998) 96 LGERA 330, 365–6 [123] (Gummow J).

19 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 470–2 (Gummow J); see also Anthony Gray, 'Options for the doctrine of Crown immunity in 21st century Australia' (2009) 16 *Australian Journal of Administrative Law* 200, 202–4.

20 *Bropho* (1990) 171 CLR 1.

21 In relation to NSW Government functions, see Gary L Sturgess, *Diversity and Contestability in the Public Service Economy* (2012) 7.

22 See *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, adopted in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

23 See also *CCA* ss 44AC, 44E, 95D, provisions which specifically apply pt IIIAA (concerning the Australian Energy Regulator), pt IIIA (the access regime) and pt VIIA (the prices surveillance regime) to the Crown in right of the Commonwealth.

24 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976) 87 [10.25] ('Swanson Report'); *Trade Practices Amendment Act 1977* (Cth) s 4.

subject to the *TPA*. The Swanson Committee emphasised that the *TPA* should not apply to the Commonwealth's discharge of its 'purely governmental function'.[25] At the same time, the existing definition of 'business' was amended to include 'a business not carried on for profit'.[26] These provisions remain unchanged.

Major competition policy and legislative reforms occurred in 1995 following the agreement of all Australian governments in 1991 to examine a national approach to competition law and policy and the report of the Hilmer Committee.[27] The Hilmer Committee considered generally whether the *TPA* should be expanded to deal with anticompetitive conduct of persons or enterprises not currently caught by the *TPA*.[28] This review also followed decisions which held that the Crown in right of a state and the Crown in right of the Northern Territory was not bound by the *TPA*,[29] on the basis that in the absence of express words or a necessary implication, legislation did not bind the Crown.[30] Before Hilmer reported, the High Court in *Bropho*[31] found that the *Aboriginal Heritage Act 1972* (WA) would bind the Crown in the absence of express words or necessary implication where the provisions of the legislation, including by reference to its subject matter, purpose and policy (when construed in the context of permissible extrinsic aids) disclosed an intention to bind the Crown. The Court rejected 'a prerogative to override the provisions of a duly enacted statute'.[32] The majority criticised treating Crown immunity as an 'inflexible principle' which would preclude a statute from binding the Crown unless a more onerous test of 'necessary implication' was satisfied.[33]

In this context, and despite this shift in principle, the Hilmer Committee reported in 1993 that Crown immunity should have no place in the competitive conduct rules of a national competition policy.[34] The Hilmer Committee's actual recommendation is instructive: it recommended the removal of Crown immunity from the Commonwealth, States and Territories, 'in so far as the Crown in question carries on a business or engages in ... competition (actual or potential) with other businesses'.[35] Relevantly, only the first part of the recommendation was implemented: liability was extended to

25 Swanson Report, above n 24, 87 [10.25].

26 A definition of 'authority of the Commonwealth' was also introduced that included:

> (a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or
>
> (b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest ...

Trade Practices Amendment Act 1977 (Cth) s 4.

27 *Special Premiers' Conference Communiqué*, Sydney, 30 July 1991.

28 Frederick Hilmer and Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy Review* (1993) 362, Annexure A ('Hilmer Report').

29 See *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107; and *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212.

30 *NT Power* (2004) 219 CLR 90, 102 [17]–[18] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

31 *Bropho v Western Australia* (1990) 171 CLR 1.

32 Ibid 15.

33 Ibid 16.

34 Hilmer Report, above n 28, 121.

35 Ibid 121–2.

the Crown in so far as it is carrying on a business, but not to the extent that it engaged in competition, *actual* or *potential*, with other businesses.

The Hilmer Report generally took the overall approach that competition law should apply to all market participants, and that available exemptions, such as those for intra-governmental commercial activities, should only be granted on the basis of a clear public interest made out on one of two grounds: that the activity was subject to market failure or where valued social objectives may not be achieved in a competitive environment.

The Council of Australian Governments adopted the Hilmer principles,[36] which became the basis for the National Competition Policy ('NCP') reforms. The NCP reforms were implemented by three agreements: the *Competition Principles Agreement*, the *Conduct Code Agreement*, and the *Agreement to Implement the National Competition Policy and Related Reforms*. Relevantly, the *Conduct Code Agreement* provided that the Commonwealth, States and Territories 'agree that the Competition Code text should apply by way of application legislation to all persons within the legislative competence of each State and Territory'.[37] The practical effect of the *Conduct Code Agreement* was that the States and Territories agreed to enact legislation to apply the 'schedule version' of pt IV of the *TPA*, contained in the Competition Code text, to 'persons' by way of complementary enactment of application Acts in each of the States and Territories.[38] Interestingly, this was not the Hilmer Committee's preferred methodology for implementation,[39] but delivered the important amendment.[40] Importantly, the Minister's Second Reading speech contained the following qualification: 'Many public sector organisations have both commercial and non-commercial functions, and these reforms are not designed to affect the non-commercial functions undertaken for governments.'[41]

At the same time, a new s 2C provided a list of exemptions to the definition of 'carries on a business,' including a broad exemption for intra-governmental commercial transactions.[42] This was arguably contrary to the

36 Council of Australian Governments, *Conduct Code Agreement* (11 April 1995), as amended (13 April 2007) ('*Conduct Code Agreement*').

37 Ibid cl 5(1). A number of options for implementation were considered by the Hilmer Committee. Sections 2B, 2C and 2D were not part of the Schedule version.

38 The fact that the complementary enactments bound 'persons' and not 'corporations' arises from the application Acts not relying upon particular constitutional heads of power to ensure validity: see *NT Power* (2004) 219 CLR 90, 103–4 [24] (McHugh ACJ, Gummow, Callinan and Heydon JJ); Hilmer Report, above n 28, 347.

39 *NT Power* (2004) 219 CLR 90, 104 [27] (McHugh ACJ, Gummow, Callinan and Heydon JJ). See Hilmer Report, above n 28, 342–3. The Hilmer Report considered that the 'simplest and most efficacious' way to implement this was to amend the Commonwealth statute as it was within Constitutional power (citing *Commonwealth v Tasmania* (1983) 158 CLR 1), after full consultation with the States.

40 See, eg, *Competition Policy Reform (New South Wales) Act 1995* (NSW) ss 13–14 which apply the Competition Code to the Crown in right of New South Wales in so far as it carries on a business either in New South Wales or in other jurisdictions. The application law provisions (similar to those in New South Wales) in the statutes of each State and Territory uniformly apply the Competition Code.

41 Commonwealth, *Parliamentary Debates,* House of Representatives, 30 June 1995, 2796 (Hon George Gear, Assistant Treasurer).

42 *Competition Policy Reform Act 1995* (Cth) s 81 ('*Reform Act*').

recommendations of the Hilmer Report, which had considered such an enactment unnecessary given that the general conduct rules did not limit governments' capacity to pursue non-commercial objectives, provided it was not done anticompetitively.[43] Despite this, certain activities are designated non-exhaustively in s 2C as not carrying on a business:

- imposing or collecting taxes, levies or fees for licences;
- granting, refusing to grant, or suspending licences, whether or not subject to conditions;
- transactions involving only persons acting for the Crown in the same right, or the Crown and one non-commercial authority of the Commonwealth or the same state or territory;
- only non-commercial activities of the Commonwealth, state or territory;
- all persons are acting for the same local government body;
- all bodies are non-commercial; and
- the compulsory acquisition of primary products by a government body under laws, unless it is exercising, or has not exercised, a discretion that it has under the laws which would allow it not to acquire the products.

The Explanatory Memorandum for the *Competition Policy Reform Act 1995* (Cth) ('*Reform Act*') noted that s 2C was specifically designed to exclude a transaction from the *TPA* like the construction contract for the provision of offices to government in *National Management Services (Australia) Pty Ltd v Commonwealth*.[44] However, examination of that case suggests that these were the very circumstances, being intra-governmental contracting between two departments of the Commonwealth Government where there was no market failure being remedied or valued social objective being achieved by the government provision of the services, in which the Hilmer Committee considered efficiency gains could be realised by applying the *TPA*.[45] There the Court held that the Commonwealth's development of five floors of a commercial building through the Department of Administrative Services for use as Cabinet and Ministerial offices was not conduct where the Commonwealth was 'engaged in a trading or commercial activity which could appropriately be characterised as carrying on a business'.[46]

The *Reform Act* also introduced s 2D, which provided specific exemptions for local government from the application of pt IV. These exemptions related

43 Hilmer Report, above n 28, 132.

44 (1990) 9 BCL 190 (McLelland J) ('*National Management Services*'). Relevantly, the Explanatory Memorandum stated that s 2C was not to apply in intra-governmental commercial activities as:

> between the Commonwealth Department of Defence and the Commonwealth Department of Administrative Services, both of which are part of the same legal entity (the Crown in right of the Commonwealth). This transaction is not to be regarded as a business activity.

See Explanatory Memorandum, Competition Policy Reform Bill 1995 (Cth) 47 [350].

45 *Reform Act* s 86, significantly amended s 51(1), narrowing the ability of governments to provide a statutory exemption from the application of the *TPA*: this could only be done by express terms and by 'fully participating' jurisdictions which had implemented their own application legislation.

46 *National Management Services* (1990) 9 BCL 190, 198.

to the granting, suspension and variation of licences and for transactions internal to a local government.[47] However, subsequently the Productivity Commission recognised the potential costs of local government both regulating and competing in a market,[48] and recommended the repeal of s 2D and the introduction of a provision 'directly limiting the application of Part IV to the business activities of local governments' in a similar form to that which applies pt IV to other tiers of government.[49] This recommendation was implemented by the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth).

This historical foray shows that uniformity of *CCA* application to each level of government in Australia has been achieved over 40 years. The progressive amendments reflect an ambition to make government liable when it is operating in the market and provide private participants with remedies against government and statutory authorities in circumstances other than those involving a purely governmental function. The balance that has been sought and reinforced is to protect the valued social objectives which government provides in accordance with community values and to achieve efficiencies which may assist in the achievement of such social objectives.

Part 2: The limitations of 'carries on a business'?

It is helpful at this point to turn to the manner in which 'in so far as it carries on a business' has been interpreted in the *TPA* and *CCA*, to identify its limitations.

At the outset it is important to note that the construction of 'carries on a business', as it applies to the Commonwealth in s 2A, State and Territory governments in s 2B, local government in s 2BA and under State and Territory competition codes, will apply interchangeably.[50] Indeed, in *NT Power* the analysis at times proceeded on the basis of the *TPA* and, at other times, on the basis of the Northern Territory's Competition Code. The High Court did not consider it necessary to determine the correct statutory scheme, although it referred to the *TPA* in the decision.[51]

Outside of the *CCA* context, in *Hope v Bathurst City Council*, Mason J noted that it is the popular meaning of the phrase 'carrying on a business', not the popular meaning of 'business' alone, which gives the phrase its meaning in its statutory context.[52] In the absence of a statutory definition, the phrase 'carries on a business' is to be construed as a whole in its statutory context. What follows is consideration of its judicial construction in the *TPA* in three

47 Productivity Commission, *Review of Section 2D of the Trade Practices Act 1974: Local Government Exemptions*, Report No 23 (2002) iv–v, x. The Productivity Commission found little evidence of anticompetitive conduct arising from this exemption.

48 Ibid x.

49 Ibid.

50 Eg, the construction of 'carries on a business' in ss 2A, 2B can be done interchangeably despite slightly different statutory contexts: see *Murphy v Victoria* (2014) 45 VR 119, 132–3 [47]–[48] (Nettle AP, Santamaria and Beach JJA) ('*Murphy*').

51 *NT Power* (2004) 219 CLR 90, 104 [29] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

52 (1980) 144 CLR 1, 8. The importance of the statutory context in construing 'carrying on business' was also noted in *Luckins (Rec and Mgr of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 178 (Gibbs J; Mason J agreeing).

parts: first, prior to the High Court's decision in *NT Power*, second, in *NT Power*, and finally, following *NT Power*.

Prior to *NT Power*

A flurry of cases considered when government 'carries on a business' between the amendment of s 2A in 1977 and the decision in *NT Power*; however, the most pertinent decisions are those from the period following the uniform application of the *TPA* to the Crown in right of State and Territory governments in light of the Hilmer Report. A helpful summary of those decisions was set out by Sundberg J in *Sirway Asia Pacific Pty Ltd v Commonwealth,* where it was held that the acquisition of crockery by the Department of Defence did not amount to the Department carrying on a business. There, his Honour discussed the variety of instances where courts had considered whether certain activities of the Commonwealth amounted to carrying on a business.[53] His Honour noted the Australian Government Publishing Service ('AGPS'), the Australian Telecommunications Commission, the Australian Postal Commission and the Australian Broadcasting Commission had all been held to be businesses of the Commonwealth. On the other hand, the Commonwealth was held not to be carrying on a business by operating detention centres, inviting tenders to be submitted and dealing with prospective tenderers, providing pharmaceutical, sickness and hospital benefits and medical and dental services in its administration of the *National Health Act 1953* (Cth), operating the Trade Practices Commission and leasing and developing a site for the purpose of establishing Cabinet and Ministerial offices. His Honour noted the government was also not carrying on a business in its role in commercialising information technology solutions with private enterprises, despite exhibiting the technology at information technology conferences, showcasing the technology to other nations and acquiring intellectual property rights over it.[54] His Honour noted that under the analogous test in s 2B (the Crown in right of the State) courts had concluded that activities which did not constitute carrying on a business included managing a national park and providing police and corrective services. However, the Ambulance Service of New South Wales, by providing ambulance services at sporting events and first aid training for reward, was found to be carrying on a business.

In addition to the examples nominated in that judgment, other cases of interest include a finding that the Department of Agriculture was not carrying on a business for the purposes of ss 3 and 4 of *Fair Trading Act 1987* (NSW) when it implemented a policy to eradicate a cattle disease and paid owners for the destruction of those cattle,[55] and a finding that public hospital services

53 *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152 (18 September 2002) [56] (citations omitted) ('*Sirway*').

54 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 306 [1395] ('*GEC Marconi*').

55 *New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1, 7 [33] (Spigelman CJ), 9 [47] (Sheller JA), 35 [134]–[135] (Hodgson JA).

being provided in a private hospital without payment of fees[56] were not subject to the *TPA*.

From those and other cases, a series of principles emerged, which were helpfully summarised by Finn J in *Village Building v Canberra International Airport*, a case in which his Honour found that Airservices Australia, an authority of the Commonwealth, was not carrying on a business in its endorsement of certain maps required for the development of airports. His Honour set out the following principles:

> (1) The [*TPA*] applie[d] to the Commonwealth only 'insofar as' the Commonwealth carries on a business either directly or by an authority of the Commonwealth. Where particular activities undertaken by the Commonwealth or an authority constitute the carrying on of a business, the ambit of those activities must be examined to see whether the impugned conduct was engaged in as part of, or in the course of, the carrying on of that business ... The business in question may relate to only a part, even a small part, of activities of the Commonwealth or the authority which, when considered as a whole, are plainly the provision of government services and not a business ...
>
> (2) The 'carrying on of a business' that would bring the Commonwealth under the [*TPA*] refers to activities undertaken in a commercial enterprise or as a going concern ...
>
> (3) While the term 'business' ordinarily connotes activities engaged in for the purpose of profit on a continuous and repetitive basis ... a 'business' for the purposes of the [*TPA*] includes a business not carried on for profit ... However, this does not mean that all non-profit activities constitute a business or that the existence or absence of a profit-making purpose is not a relevant factor in determining whether there is a business activity ... Equally, the provision of services for remuneration may constitute the carrying on of a business irrespective of the commercial adequacy of the remuneration ...
>
> (4) While repetition, systems and regularity are indicia of carrying on a business, they are not on their own sufficient to compel a conclusion that such is the case ... There must be present some element of commerce or trade such as a private citizen or trader might undertake ...
>
> (5) A business activity is an activity which takes place in a business context and which, of itself, bears a business character ... Where an activity is engaged in by the Commonwealth or a Commonwealth authority the purpose of the activity will be a relevant consideration ... An activity is unlikely to be characterised as having a business character, or to take place in a commercial context, where it involves the carrying out of a regulatory or governmental function in the interests of the community or the performance of a statutory duty in respect of which fees are charged ...[57]

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56 *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc* (2003) 199 ALR 423, 491–2 [393]–[395].

57 This case is of particular utility in considering the principles which have emerged as it was the last statement of principles prior to *NT Power* (2004) 219 CLR 90: *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 134 FCR 422, 445–6 [90] (citations omitted) ('*Village Building*'). This decision was appealed to the Full Court on a separate issue: *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 139 FCR 330 ('*Village Building Co Ltd*').

To return to the first of the above principles, that the *TPA* applies only 'in so far as' the government 'carries on a business', it is worth noting *JS McMillan Pty Ltd v Commonwealth*.[58] There, Emmett J held that the Commonwealth, in inviting tenders on a one-off basis for the purchase of the assets and commercial operations of the AGPS, was not 'carrying on a business'. This was despite a finding that the AGPS was evidently 'carrying on a business' in its day-to-day operations. Instead, his Honour found that the expression 'in so far as it carries on a business':

> signifies that the Commonwealth is to be bound only where the conduct complained of is engaged in, in the course of carrying on the business. In other words, persons dealing with the Commonwealth in relation to the actual conduct of a business will have the same protection as when dealing with a private trader who is carrying on such a business but will not have protection when entering into other dealings with the Commonwealth.[59]

In arriving at this construction, his Honour relied on the Minister's Second Reading speech which stated that 'the [*TPA*] is to apply to all business undertakings of the Commonwealth Government and its authorities'.[60] The drafting of the provision to include the qualifying term 'in so far' led his Honour to conclude that despite the fact that the AGPS was 'carrying on a business':

> The conduct complained of is that of officers of the Commonwealth who have had nothing to do with the day-to-day operations of the AGPS. It is conduct quite divorced from the carrying on of that business.[61]

His Honour found that the one-off decision of the Commonwealth to sell the assets and commercial operations of the AGPS was not conduct in the course of 'carrying on a business'.

This decision poses issues in applying the *CCA* to government procurement. Arguably, procurement may not be the business that the government in right of the Crown is carrying on due to a lack of regularity in purchasing, but it may fall squarely within the scope of activity which should be subject to the *CCA* if the broad application of the *TPA* and *CCA* suggested by Hilmer, Harper and others is required.

Another central feature of decisions prior to *NT Power* is the general vagueness by which some function of government is characterised as 'governmental' in character and therefore beyond the scope of 'carrying on a business'.[62] Earlier decisions illustrate that courts have been willing to accept that certain functions of government are not 'carrying on a business' despite their lack of a strict connection to a particular legislative or regulatory provision. For instance, in *Sirway*, Sundberg J was prepared to accept that:

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58 (1997) 77 FCR 337 ('*JS McMillan*').
59 Ibid 356.
60 Ibid.
61 Ibid 356–7.
62 Finn J commented that 'I do not find the distinction sometimes drawn between "governmental" and "non-governmental" activities a particularly illuminating one': see *GEC Marconi* (2003) 128 FCR 1, 305 [1388]. To this extent the test might be described as a 'gloss' on analysis or a label ascribed to particular conduct once a decision has been made for other reasons.

> the Department's trade in or acquisition of chinaware so obviously relates to the execution of a government function which is in the interests of the community, it does not have the characteristic of carrying on a business.[63]

This conclusion was reached without connection between a statutory obligation of the Department of Defence to acquire crockery, or a finding that the Department was discharging a government function.[64] Rather, the characterisation was broadly based on a general obligation of the Department to the 'defence of Australia and its national interests'.[65] Similar reasoning can be observed in *Corrections Corporation,*[66] *JS McMillan,*[67] and *GEC Marconi*.[68] This approach removes the legal standard for what is 'governmental' in nature and reduces these considerations to findings of fact.[69]

In summary, the discussion above illustrates that, rather than a wide number of authorities crystallising key principles and giving rise to a coherent body of law as to what constitutes 'carrying on a business' under the *CCA*, authorities prior to *NT Power* are ambiguous and conflicting. An absence of 'regularity' in a particular government activity and an ad hoc characterisation of what amounted to sufficiently 'governmental' activity instead have been enough to deny that the Crown or an emanation of the Crown would be carrying on a business for the purposes of the *CCA*. This construction of 'carries on a business' limits the application of the *CCA* to significant government action in the economy which if undertaken by private enterprise would be subject to the *CCA*. These difficulties are reflected in the success of numerous strike out applications based on this jurisprudence which dealt with the question of whether the government or an authority was 'carrying on a business' on an interlocutory basis.[70]

The decision in *NT Power*

Against this jurisprudence, the High Court in *NT Power* considered the meaning of 'carries on a business' in s 2B of the *TPA*. Power and Water Authority ('PAWA') was a vertically integrated government-owned power supplier in the Northern Territory. It generated electricity at several different stations and purchased electricity from other wholesalers to sell to the general public via its transmission lines and distribution facilities. NT Power was exclusive supplier of electricity to a mine which ceased to operate. NT Power then wished to sell electricity to the general public by use of the PAWA

63 *Sirway* [2002] FCA 1152 (18 September 2002) [62].
64 Ibid [58], [62].
65 Ibid [58].
66 *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448, 452 [14] ('*Corrections Corporation*').
67 *JS McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337, 355.
68 This decision was particularly opaque as the technology project was driven by 'governmental imperatives': *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 305 [1388].
69 The shortcomings of such an approach were recognised by Finn J in *Village Building*, where reliance was instead placed on a statutory obligation and ministerial direction to connote Airservices Australia as possessing a sufficient governmental function: *Village Building* (2004) 134 FCR 422, 446–7 [91].
70 See, for instance, *Corrections Corporation* (2000) 104 FCR 448; *Village Building* (2004) 134 FCR 422.

transmission and distribution facilities. PAWA granted NT Power a licence to sell electricity generated by it to any person in the Northern Territory in June 1998. In August 1998, a letter from PAWA's solicitors denied that access to the transmission and distribution facilities had been agreed, stating that the issue of access was subject to a policy review. Proceedings were commenced in 1999, with NT Power alleging that PAWA had breached the *TPA* in denying access. This required NT Power to show that PAWA was carrying on a business under s 2B of the *TPA*. PAWA claimed that the transmission and distribution facilities were outside the scope of business activity since it had never previously leased them. The trial judge found the impact of the letter was that NT Power was not to be granted access at least until the formal access regime under pt IIIA of the *TPA* was introduced in April 2000.

While the High Court's judgment touched upon a number of issues,[71] it is the majority's discussion of when government 'carries on a business' which is important to this article.[72] First, the majority found that PAWA was 'carrying on a very substantial business', relying on its 1998 annual report produced under s 28(1) of the *Public Sector Employment and Management Act* (NT), which discussed various segments of business including upstream and downstream businesses.[73] The import of the annual report was that it reflected the 'commercialisation' of PAWA, and contained admissions about the business which were of the 'utmost solemnity', being made under a statutory duty, and to be made public. The majority judgment suggests that if government is required to make disclosures in a similar manner to those of a private corporation, then government is to be treated like a private corporation.[74]

The majority revisited in detail the legislative reforms which had applied the *TPA* to government, noting the objects of the legislation and the Minister's Second Reading speech to the *Reform Act*, where it was said that the extension of pt IV competitive conduct rules to what were exempt businesses was one of the main aims of the *Reform Act*.[75]

The majority found the application of the *TPA* to government was developed methodically over a number of years, with a clear purpose of capturing the business carried on by the Commonwealth and States. It was this approach that led the majority to find that:

> It may be accepted that the conduct proscribed by the [*TPA*], if it is to fall within s 2B, must be engaged in in the course of PAWA carrying on a business. *But the conduct need not itself be the actual business engaged in*. Had s 2B not been

71 For a full discussion, see Christos Mantziaris, 'When Government "carries on a business"/derivative Crown immunity: *NT Power Generation Pty Ltd v Power & Water Authority*' (2005) 16 *Public Law Review* 5.

72 *NT Power* (2004) 219 CLR 90, 116–19 [65]–[76] (McHugh ACJ, Gummow, Callinan and Heydon JJ), 160–3 [195]–[205] (Kirby J dissenting) did not consider the meaning of 'carries on a business' within the context of the *TPA*, relying instead on a construction of *TPA* s 46 to determine the matter.

73 Ibid 111 [54], [55].

74 John Griffiths, 'Application of the *Australian Consumer Law* to Government Commercial Activities' (Paper presented at Commercial Law and Government Conference, NSW State Library, 16 September 2016) 10; Mantziaris, above n 71, 9–10.

75 Ibid.

> enacted, the conduct alleged against PAWA would not be examinable under the legislation because PAWA is an authority of the Territory — part of the 'Crown in right ... of the Northern Territory', ie the Northern Territory Government. But where such an authority 'carries on a business' this removes the governmental obstacle to curial examination of its conduct in order to see whether s 46 has been contravened. *PAWA would reverse the process and invert the correct approach*: according to PAWA, it is necessary to examine specific conduct, and only when a particular contravention is found is it then relevant to examine whether that contravention can be described as carrying on a business.[76]

The majority clearly contemplated that the correct approach is to determine whether the government 'carries on a business' and, if it does, then conduct which is incidental to that 'business' will fall within the scope of ss 2A, 2B, 2BA or one of the various State or Territory application provisions.

The majority in *NT Power* favoured the view that the limited conduct that is beyond the scope of application of the *CCA* includes those transactions where the government as sole shareholder undertakes the transaction on behalf of the 'business'. For example, the majority considered that the decision in *JS McMillan* was correct, as the government was selling the AGPS and did not involve officers or employees concerned with the day-to-day operations of the enterprise in that transaction.[77] This leaves conduct such as privatisations or leasing of government-owned assets, particularly where those sales or leases are not conducted by persons involved in the business, beyond the scope of the *TPA*/*CCA*.[78]

Applying this reasoning to determining when government procurement is subject to the *CCA*, the majority judgment illustrates that the question is not whether the government's alleged contravening conduct is in the course of government 'carrying on a business'. Instead, the majority identifies that the relevant question is whether the government is 'carrying on a business' and, if government is 'carrying on a business' and if the procurement is incidental to the 'business', the procurement will be subject to the *CCA*.[79] Whether procurement is regular and systematic or occurs in a particular market in which the government is 'carrying on a business' is not essential to determining whether such conduct is subject to the *CCA*. Under *NT Power*, procurement need only be incidental to the 'business' that government 'carries on'. However, the majority did not distinguish the approach taken by Emmett J in *JS McMillan* and appeared to endorse the view that one-off transactions such as asset sales were not conduct occurring where government 'carries on a business'.[80] The majority also noted that it does not matter whether the alleged contravening conduct is not in a particular 'market' in which the government is carrying on a business, it matters only that the

76 *NT Power* (2004) 219 CLR 90, 116–17 [67] (emphasis added).
77 Ibid 119 [74] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
78 Mantziaris, above n 71, 9.
79 *NT Power* (2004) 219 CLR 90, 116–17 [67] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
80 The majority emphasised that the Commonwealth officers selling the AGPS 'had nothing to do with the day-to-day operations of the enterprise': *NT Power* (2004) 219 CLR 90, 119 [74] (McHugh ACJ, Gummow, Callinan and Heydon JJ).

government is carrying on a business.[81]

The effect of the judgment is that the scope of activities which will be considered to determine when government 'carries on a business' was significantly broadened.[82] While this approach would appear to include incidental procurement for a government to 'carry on a business', the majority's approach would not include all procurement or supply by government, or one-off transactions (such as an asset sale, restructuring or winding up).

When government 'carries on a business': Applying *NT Power*

Following *NT Power*, a number of judgments have interpreted when government 'carries on a business'. These decisions appear to confirm the wider scope of government conduct subject to the *CCA* following *NT Power*, although there have not yet been final decisions solely concerning whether procurement or a one-off transaction fall within the revised definition.

For instance, in *RP Data Ltd v Queensland*,[83] Collier J of the Federal Court concluded on the basis of *NT Power* that the State was carrying on a business in relation to its sale of wholesale data of Queensland's real property valuation information (which the respondent had a discretion to sell under the *Valuation of Land Act 1944* (Qld)), but not in relation to retail sales of that same data (the sale of which was compulsory under the same statute), which were characterised as an 'act of government'.[84]

In another case, an industry body charged with marketing, research and development, and lobbying on behalf of the egg industry, was found not to be an emanation of the Crown. The Court found if it had been representing the Crown, it would have been carrying on business, citing *NT Power*.[85] Despite the industry body being government-funded and with objects of promoting the egg industry,[86] its functions were not 'exclusively' governmental in nature and when the commercial nature of its operations was also accounted for, it was carrying on a business.[87] In contrast, in *Roads and Maritime Services v Devine Marine Group Pty Ltd,*[88] the Court found the plaintiff was not carrying on a business in seeking 'expressions of interest to develop, lease or licence' land which it controlled.[89] However, the Court relied on earlier authorities, such as *Corrections Corporation* and *JS McMillan*, and did not discuss *NT Power*.[90]

81 Ibid 118 [70] (McHugh ACJ, Gummow, Callinan and Heydon JJ).
82 Mantziaris, above n 71, 8.
83 (2007) 221 FCR 392, 411–12 [48].
84 Ibid 414–15 [55]–[59].
85 *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2016) 337 ALR 573; appeal dismissed *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152 (25 September 2017). The issue of whether the industry body was carrying on a business was not appealed.
86 *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2016) 337 ALR 573, 607 [175]–[176].
87 Ibid 607 [174], 607–8 [180].
88 [2013] NSWSC 1467 (4 October 2013).
89 Ibid [131]–[132].
90 His Honour went on to say that 'in undertaking the conduct said to constitute the

The post-*NT Power* jurisprudence also suggests that courts are less willing to strike out or summarily dismiss applications on the basis that government or a body in right of the Crown is not carrying on a business.[91] In *Murphy v Victoria*, the Court of Appeal overturned the trial judge's interlocutory decision that the State was not carrying on a business in its development of the East West Link, where a public private partnership was building a motorway.[92] The Court of Appeal applied *NT Power,* emphasising that the Crown in right of Victoria should in its commercial activities be subject to the same regime as corporations and other private entities.[93] The Court distinguished between representations which are purely governmental or regulatory and those which entail the carrying on of a business.[94] However, the Court stated that these two purposes 'may co-exist' in the same representation and 'may yield a conclusion that the State is carrying on a business in conjunction with or at the same time as discharging its purely governmental functions'.[95] This represents a significant widening of the scope of conduct caught by the provision from earlier decisions, where prior to *NT Power*, the presence of a governmental purpose to a representation or activity would likely negate the fact that such a representation or activity was in the course of government carrying on a business.[96] The Court also noted that a trial was generally necessary to assess the facts to determine whether a business was or was not discharging a governmental function.[97]

Further, in *Salvation Army (NSW) Property Trust v Commonwealth*,[98] Jagot J dismissed an application to strike out certain paragraphs of a statement of claim relating to this issue. The Salvation Army was providing welfare and support services at regional immigration processing centres under contract with the Commonwealth. It claimed that a misleading or deceptive representation was made by the Commonwealth that in providing the services it could implement a 4-week roster system for its staff. The Commonwealth argued it was not carrying on a business, as it was providing services in connection with memoranda of understanding entered into between Australia, Nauru and Papua New Guinea, although the memoranda were not in evidence. Her Honour noted that while there was power under Australian law for a Minister to designate a regional processing centre in another country, there

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contravention, the conduct *itself* was done in the course of carrying on a business', however this is contrary to the position in *NT Power* that 'the conduct need not itself be the actual business engaged in': ibid [134]; *NT Power* (2004) 219 CLR 90, 116–17 [67].

91 Eg, see also the refusal to grant a strike out application without making final finding of facts in circumstances where *NT Power* was considered by the Court: *PPK Willoughby Pty Ltd v Roads and Maritime Services* [2014] NSWSC 407 (9 April 2014) [26].

92 This was one of three questions that the trial judge decided on an interlocutory basis: (2014) 45 VR 119, 131 [45] (Nettle AP, Santamaria and Beach JJA).

93 Ibid 132–3 [47]–[48].

94 Ibid 138 [58].

95 Ibid.

96 Eg, as discussed earlier in *Sirway* [2002] FCA 1152 (18 September 2002).

97 The Court of Appeal held that the 'nature and purpose of the planning and development' would depend on considerations such as whether it was a commercial operation and the stage or level of the planning and development: *Murphy* (2014) 45 VR 119, 139 [61]–[63].

98 (2015) 147 ALD 677.

was no evidence that this had been done.[99] There was power under statutes of Papua New Guinea and Nauru for the government to operate regional processing centres, but her Honour held that the relevant statute to determine sufficiency of a governmental or regulatory power needed to be an Australian statute.[100] Her Honour noted that:

> it is not apparent from the matters pleaded that the Commonwealth is doing anything different from that which a private entity might potentially do in a role as a head contractor for the operation of the regional processing centres.[101]

The Court refused the strike out application on the basis that the issue could only be determined after a trial on all the facts.[102] However, her Honour noted that it did not appear that the Commonwealth was acting under Australian law and therefore was 'not exercising any statutory function when it contracted with the Salvation Army'.[103]

In light of *NT Power*, this decision reflects the importance of a nexus between a statutory purpose and the business that is being carried on to establish a governmental purpose. Thus, it seems that only when there is a clear statutory or regulatory function being discharged is there likely to be conclusive evidence that the government or government authority is not 'carrying on a business'. Subsequent to *Murphy v Victoria*, even when there is a statutory or regulatory function being discharged, a business function may also be being performed.

Finally, despite the fact that there has been limited consideration of the operation of the s 2C exemption, *Markit Pty Ltd v Commissioner of Taxation (Cth)* provides some insight into its application in light of *NT Power*.[104] There, it was claimed that the Commissioner of Taxation was carrying on a business by enforcing tax debts through legal proceedings and therefore was subject to the misleading or deceptive conduct prohibition in s 52 of the *TPA* in that conduct. The Court held that the exemption in s 2C(1) to tax collection applied as the Commissioner's conduct was not beyond the scope of that provision merely 'because the process of collection is rendered more complex and indirect through a taxpayer's failure to pay'.[105] The Court did not apply the 'core conduct' test from *NT Power*; however, the judgment reflects the principle that where the business being carried on is in its 'core conduct' exempt under s 2C, then the business is exempt from the application of the *TPA*.

In summary, the decision in *NT Power* has significantly widened the scope of government conduct that is subject to the *CCA*. While the principles for application to government or government authorities have not departed greatly from those used prior,[106] key principles articulated by the majority have shaped the subsequent application of the *TPA*.

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99 Ibid 683 [17], 684 [19].
100 Ibid 685 [25], [27].
101 Ibid 685 [25].
102 Ibid 683–4 [18].
103 Ibid 685 [27].
104 [2007] 1 Qd R 253.
105 Ibid 256–7 [27].
106 For instance, compare the principles stated by Finn J in *Village Building Co Ltd* (2004) 134

First, the contravening conduct 'need not itself be the actual business engaged in' to be subject to the *CCA*. This permits aspects incidental to when government 'carries on a business' to be subject to the *CCA* and captures some aspects of when government 'carries on a business' typically considered not to be subject to the *CCA*, such as procurement or the leasing of property for the purpose of government carrying on a business. The construction given to 'carries on a business' also emphasises that unless the activity is exempt under s 2C or s 51(1), other activity in which the government 'carries on a business' should be subject to the 'same regime' as corporations, subjecting government supply of goods and services to the remedial legislative regime of pt IV and the *Australian Consumer Law* ('*ACL*'). However, one-off transactions conducted by the government, such as that in *JS McMillan,* appear to remain beyond the scope of the *CCA*, particularly when they are carried out by people who are not involved in the business itself.

Second, decisions subsequent to *NT Power* suggest that to exempt government or government authorities from 'carrying on a business' on the ground that they are engaged in a governmental purpose, there should generally be a clear statutory or regulatory function being discharged. This suggests that it is a question of law whether conduct is 'governmental' in character, rather than a finding of fact based on a general characterisation of the nature of the conduct. This is a more coherent test than that previously applied, which involved a general characterisation of whether the business was commercial or governmental in its function.[107]

The import of these findings is that not only is much more activity subject to the *CCA*, but there is also a significantly more coherent test of whether government is 'carrying on a business'. It is a question of law. This provides greater certainty to government and persons dealing with government.

Part 3: Harper Review recommendation

The Harper Review recommendation follows on from recommendations of the Productivity Commission in its final review of the NCP reforms in 2005.[108] The Productivity Commission recognised that *NT Power* had substantially

FCR 422, 445–6 [90] as against those stated by Croft J in *Murphy v Victoria [No 2]* (2014) 289 FLR 245, 271–3 [51] and endorsed by the Court of Appeal in *Murphy* (2014) 45 VR 119, 132 [47].

107 For instance, in *Corrections Corporation* (2000) 104 FCR 448, 452 [14], *GEC Marconi* (2003) 128 FCR 1, 305 [1389] and *Sirway* [2002] FCA 1152 (18 September 2002) [62] there was no reference to a particular statutory or regulatory provision which established the governmental purpose of the activities subject of the claim. Instead, the courts in those instances favoured making factual characterisations that such conduct was governmental in purpose due to some vague connection between the activity and a purported governmental object. This is contrary to the position in more recent cases such as *RP Data* (2007) 221 FCR 392 and *Salvation Army* (2015) 147 ALD 677, which required a specific nexus between the activity and a law, regulation, instrument or other legal obligation for such an activity to be governmental in purpose.

108 Productivity Commission, *Review of National Competition Policy Reforms,* Report No 33 (2005).

clarified the law but noted that 'it did not specifically deal with the applicability of the *TPA* to government procurement practices'.[109] The Productivity Commission concluded:

> In the Commission's view, given the role of government as major (and in some cases the sole) purchasers of a range of goods and services, the manner in which procurement activities are conducted could potentially have substantial impacts on competition within markets. Hence, lack of clarity in the current arrangements may be frustrating the intent of the NCP reforms. In this regard, the Commission notes that the New Zealand *Fair Trading Act* specifically defines the activities, including government procurement, that are subject to the provisions of that legislation. A similar inclusion in relation to procurement in the Australian legislation, that would apply to both the Australian Government and the States and Territories, could therefore have merit.[110]

The Productivity Commission recommended that consideration be given to amending the *TPA* to 'ensure that all Federal, State and Territory government procurement activities are covered by relevant sections of the Act'.[111] Interestingly, it did not suggest the explicit drafting to achieve this aim.

The Senate Finance and Public Administration References Committee, in a July 2014 report, also recommended that 'the government provide an explanation as to whether there are any reasons why the operation of the [*CCA*] should not apply to Commonwealth procurement'.[112] The Committee did not refer to the decision in *NT Power*, relying instead on the oral evidence of various witnesses and assuming that Commonwealth procurement processes were 'immune' from the *CCA*.[113] The Commonwealth in its response to the Senate report (published after the release of the Final Report of the Harper Review) did not consider *NT Power* and instead relied solely on *JS McMillan* in accepting that 'the *CCA* would not generally apply to the Commonwealth in its procurement activities'.[114] This position does not appear to properly reflect the principles in *NT Power*, applied in subsequent judgments, in determining when government 'carries on a business'.

The Terms of Reference for the Harper Review required consideration of 'whether government business activities and services providers serve the public interest and promote competition and productivity'.[115] ACCC submissions to the Harper Review focused mainly on anticompetitive conduct that can arise in privatisations in both its submission to the Terms of Reference

109 Ibid 277, Recommendation 10.1; see general discussion at 276–8.

110 Ibid 278.

111 Ibid.

112 Senate Finance and Public Administration References Committee, *Commonwealth procurement procedures* (2014) Recommendation 12. A minority report (Senators Bernardi, Smith and McKenzie) did not support this recommendation pending the outcome of the independent competition policy review.

113 Ibid 50–2 [5.38]–[5.46], 53 [5.53].

114 Commonwealth Government, *Australian Government Response to the Senate Finance and Public Administration References Committee Report: Commonwealth procurement procedures* (2015) 9 item 12.

115 Commonwealth Government, *Competition Policy Review Terms of Reference* (21 March 2014) [5]; cf [4.3] which required the Review to 'consider alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the [*CCA*]'.

and the Draft Report.[116] In a submission in response to the Terms of Reference, the ACCC made three key observations:

- governments may be overly focused on short-term budget goals by not having regard to longer term competition. The ACCC submitted that competition considerations should be a key part of a privatisation process;
- governments may seek to boost asset values by privatising without adequate price and access regulation, despite the fact that the imposition of more favourable terms to bidders amounts to a tax on future generations of Australians by entrenching anticompetitive advantages; and
- the merits of structural separation should be considered before an asset is privatised.[117]

The ACCC submission claimed there were a number of instances where anticompetitive terms had been incorporated into an agreement when an asset was privatised, such as in the lease of Sydney Airport,[118] and the leases of NSW ports.[119] The ACCC also discussed potential existing remedies to the introduction of such terms under s 50 of the *CCA* (which prohibits acquisitions that substantially lessen competition), and s 87B (acceptance of court enforceable undertakings as a merger remedy). It submitted, however, that 'reliance on the merger process is generally an inadequate means of dealing with complex issues of access to significant monopoly infrastructure', and instead a regulated access regime was to be preferred.[120] We note that such an access regime has since been applied to *Port of Newcastle* following the NSW Government leasing the asset in 2014.[121]

The ACCC's submission on the Draft Report of the Harper Review addressed the recommendation that the *CCA* be amended to apply to the Commonwealth, States and Territories, and local government in so far as they undertake activity 'in trade or commerce'. The ACCC submitted that the amendment to include 'in trade or commerce' should apply the *CCA* to government in two particular instances, where a government body:

- supplies goods or services in a commercial setting,[122] with the *CCA* extended to apply to supply in a commercial setting by a government body (no longer limited to where the Crown 'carries on a business');[123] and

116 See, ACCC, Submission to Competition Policy Review, 25 June 2014, 35–8 [3.3.1]; ACCC, Submission to Competition Policy Review — Response to the Draft Report, 26 November 2014, 31–3 [2.2].

117 ACCC, Submission to Competition Policy Review, above n 116, 35 [3.3.1].

118 Ibid 36.

119 Ibid 37–8.

120 Ibid 37.

121 *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6 (31 may 2016), upheld in judicial review proceedings in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115.

122 The ACCC acknowledged that supply by a government business of goods and services of this nature was already covered by the 'carrying on a business' exemption: ACCC, Submission to Competition Policy Review — Response to the Draft Report, above n 116, 33 [2.2].

123 The ACCC nominated the construction applied to 'in trade or commerce' by the Full Federal Court in *Obeid v Australian Competition and Consumer Commission* (2014) 226 FCR 471,

- acquires goods or services in a commercial setting (although such acquisitions may be covered by the approach articulated in *NT Power*, the submission appears to focus on removing any requirement to prove the acquisition to be in the course of carrying on business).[124]

Finally, the ACCC endorsed the High Court's approach in *Houghton v Arms* (discussed below) that 'trade or commerce' ought to cover commercial transactions entered into by government bodies, even where the government body is not supplying goods or services in the market.[125]

The Harper Review made various recommendations relating to the application of the *CCA* to government, including in relation to competition principles, competitive neutrality policy and government procurement generally.[126] In relation to ss 2A, 2B and 2BA, the Harper Review recognised the harm that government commercial transactions can do in markets where the Crown is acting 'in right of the Commonwealth and the States and Territories (including local government)'.[127] The Harper Review concluded that the NCP reforms 'should be carried a step further and that the Crown should be subject to the competition laws insofar as it undertakes activity in trade or commerce'.[128] The Harper Review referenced the *Commerce Act* and its use of the words 'engages in trade' to apply that legislation to government.[129] The Harper Review did not, however, suggest the adoption of the definition applying to 'trade' under the *Commerce Act*. As noted previously, the Productivity Commission in 2005 noted that definition explicitly includes procurement by expressly referring to 'the supply or acquisition of goods or services'.[130]

The Harper Review determined that the preferred amendment to expand the scope of government activity caught by the *CCA* was to amend ss 2A, 2B and 2BA to substitute 'in trade or commerce' for 'carries on a business'.[131] The Harper Review stated that this proposed reform was:

> not intended to cover all government activity. Rather, the intention is that it would cover the supply of goods or services by a government business (currently covered

484 [36]–[39], where the Minister's grant of a licence to exploit a state's minerals was held to be activity 'in trade or commerce', as the appropriate interpretation to be applied: ibid 33 [2.2] n 32.

124 For instance, where such acquisition of goods or services is for use by the government body or where such acquisition is a market-based mechanism to provide public goods or services such as the contracting out of a welfare service or lease of government-owned infrastructure: ibid 33 [2.2].

125 (2006) 225 CLR 553 ('*Houghton*'); ibid 33 [2.2] n 34.

126 See Harper Review, above n 4, Recommendation 1 (government businesses should compete with competitive neutrality principles), Recommendation 15 (recommending a competitive neutrality policy review) and Recommendation 18 (recommending governments review policies including commercial arrangements with the private sector and non-government organisations); see discussion in Griffiths, above n 74, 16–17.

127 Harper Review, above n 4, 282.

128 Ibid.

129 Ibid.

130 Productivity Commission, *Review of National Competition Policy Reforms*, above n 108; *Commerce Act 1986* (NZ) s 2(1); *Fair Trading Act 1986* (NZ) s 2(1).

131 Harper Review, above n 4, 278–82.

> by 'carrying on a business') and all other commercial transactions undertaken by government bodies (such as procurement and leasing of government-owned infrastructure).[132]

The Harper Review did consider that the exemptions in s 2C should continue to apply to governments.[133] Unlike the Hilmer Report, the Harper Review did not discuss means or models to enact the amendment.[134]

The recommendation received in-principle endorsement from the government but was not included in the Exposure Draft of legislation nor the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).[135] This is in part because, in December 2016, the Council of Australian Governments failed to settle a joint agreement between all States and Territories regarding implementation of the reforms proposed by the Harper Review. Three State governments (Queensland, Victoria and South Australia) opted not to sign the *Intergovernmental Agreement on Competition and Productivity-enhancing Reforms* ('Intergovernmental Agreement') which implemented the Harper Review recommendations. The Intergovernmental Agreement is silent on the amendment of the *CCA* in ss 2A, 2B and 2BA to 'in trade or commerce', instead merely suggesting that government commercial arrangements should be subject to a public interest test applied by governments on a self-assessment basis.[136] Under the Intergovernmental Agreement, governments must review regulation and any exemptions made available under s 51(1) of the *CCA*.[137] The failure to obtain the consent of all States and Territories to the Intergovernmental Agreement explains why the 'in trade or commerce' reform was not incorporated into the Bill. Although, in these circumstances, the Hilmer Report endorsed unilateral Commonwealth action to apply the *CCA* to government, the scheme of mirror legislation ultimately implemented prevents this approach from being adopted.

Despite the stalled nature of this reform, it is worth considering the effect that an 'in trade or commerce' amendment would have had as neither the extent of the problem nor the solution is articulated thoroughly in the Harper Review. The critical issue is not so much the particular phrase that is chosen but its meaning. This is an issue regarding 'in trade or commerce', as where the same form of words is used in the same legislation it is presumed that Parliament intended to adopt the same interpretation.[138] For this reason, it is

132 Ibid 281.

133 The only change being a minor amendment to the definition of 'licence': ibid 282.

134 See discussion of those issues in Hilmer Report, above n 28, 342–8.

135 Commonwealth Government, *Australian Government Response to the Competition Policy Review* (2015) 20; Explanatory Materials, Exposure Draft, Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (Cth); cf Elizabeth Avery, Simon Muys and Matt Rubinstein, *Rethinking the Competition and Consumer Act: Exposure draft legislation lays groundwork for the most significant change in a generation* (12 September 2016) Gilbert + Tobin <https://www.gtlaw.com.au/insights/rethinking-competition-and-consumer-act-exposure-draft-legislation-lays-groundwork-most-significant>.

136 Council of Australian Governments, *Intergovernmental Agreement on Competition and Productivity-enhancing Reforms,* 9 December 2016, app A [11]–[13].

137 Ibid app A [1]–[2].

138 *Murphy* (2014) 45 VR 119, 148 [90]; *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405, 412 [24] (Kiefel CJ, Nettle and Gordon JJ).

useful to consider the construction of 'in trade or commerce' under Australia's competition laws.

Part 4: The construction of 'in trade or commerce' under the *CCA*

In the *CCA*, 'trade or commerce' is defined broadly in s 4 to refer to 'trade or commerce within Australia or between Australia and places outside Australia'. This non-exhaustive definition was introduced when the *TPA* was enacted and remains unchanged. The Harper Review did not propose repealing or amending this definition. The phrase is widely used within the *CCA* and has been subject of much judicial consideration.

The constitutional definition of 'trade or commerce'

The meaning of 'trade or commerce', in various sections of the *CCA*, has in the past drawn on the constitutional definition of the phrase as it appears in s 51(i) of the *Constitution*. In the initial interpretations of 'trade or commerce' in the *TPA*, it was given the same meaning. However, this was generally in the context of founding the constitutional validity of applying a provision in particular circumstances (that is, such as situations where an individual and not a constitutional corporation was involved and reliance was placed on s 6).[139] This approach gives the constitutional definition significance in relation to ss 2A, 2B and 2BA of the *CCA*.

The constitutional meaning of 'in trade or commerce' has been broad, relying on the ordinary meaning of the words. For example, in *W & A McArthur Ltd v Queensland* the High Court considered a challenge to legislation enacted in Queensland to restrict prices under s 92 of the *Constitution* by a company based in New South Wales which sold its products in Queensland.[140] The Court stated:

> The terms 'trade, commerce, and intercourse' are not terms of art. They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by Judges ... The particular instances that may fall within the ambit of the expression depend upon the varying phases and development of trade, commerce and intercourse itself.[141]

The plain and ordinary definition of the phrase 'trade or commerce' has been employed in determining the Commonwealth's power to both participate in 'trade or commerce',[142] and to regulate 'trade or commerce'.[143]

This constitutional definition of what constitutes activity in 'trade or commerce' thus encompasses all aspects of business activity, whether they be

139 Eg, see *Handley v Snoid* (1981) ATPR 40-219; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120; *R v Federal Court of Australia; Ex parte West Australian National Football League (Inc)* (1979) 143 CLR 190. The necessity for this type of examination decreased significantly after the enactment of ss 2B–2C.

140 (1920) 28 CLR 530, 531–5.

141 Ibid 546 (Knox CJ, Isaacs and Starke JJ).

142 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

143 *Re Maritime Union; Ex parte CSL Pacific* (2003) 214 CLR 397.

activities conducted with system and regularity or acts which are more incidental to the purpose of a business. This broader definition of trade or commerce, if adopted in ss 2A, 2B and 2BA of the *CCA*, could encompass government business which traditionally have been outside the scope of the *CCA*, namely, activities which are one-off transactions conducted by persons not associated with the business (such as irregular procurement).

The definition of 'in trade or commerce' under the *CCA*

It was precisely the broad interpretation of 'in trade or commerce' outlined above which necessitated a narrower definition under certain provisions of the *TPA*, and now the *CCA*, such as in the former s 52 of the *TPA* (now s 18 of the *ACL*).[144] The broad constitutional definition led to the phrase expanding the scope of the *CCA* beyond regulating the activities of companies in their dealings with competitors and consumers to regulating activities within companies themselves including, for example, activities between employees of the company. The High Court imposed this limitation in *Concrete Constructions (NSW) Pty Ltd v Nelson*, where a worker made a misleading statement on a construction site causing a co-worker to suffer injuries in an avoidable fall.[145] The worker sought damages for misleading or deceptive conduct under the former s 52 of the *TPA*, and was successful at first instance.[146]

In the appeal to the High Court, the Court considered whether 'in trade or commerce' should be given its constitutional meaning. The majority (Mason CJ, Deane, Dawson and Gaudron JJ) distinguished the meaning of 'trade or commerce' from activity 'in trade or commerce'.[147] While the Court considered that the broad definition of 'trade or commerce' could extend to a case where the conduct would include incidents on a building site between employees,[148] it found that the preferred definition of activity 'in trade or commerce' was more limited:

> the words 'in trade or commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.[149]

This narrower interpretation was based on the context of the *TPA*, with particular reliance placed on the relevant section being found under the heading 'Consumer Protection'. The Court articulated instead that:

> What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is

144 *Competition and Consumer Act 2010* (Cth) sch 2.
145 (1990) 169 CLR 594.
146 *Nelson v Concrete Constructions (NSW) Pty Ltd* (1989) 86 ALR 88.
147 The majority said:

> Plainly enough, what is encompassed in the plenary grant of legislative power 'with respect to ... Trade and commerce' in s 51(i) of the *Constitution* is not of assistance on the question of the effect of the word 'in' as part of the requirement that the conduct proscribed by s 52(1) of the *Act* be 'in trade or commerce':

Concrete Constructions (1990) 169 CLR 594, 602.
148 Ibid 603.
149 Ibid.

> seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, *bear a trading or commercial character*.[150]

It is this test, the High Court said, of whether some action bears a 'trading or commercial character' which is indicative of conduct that is 'in trade or commerce'. The Court provided the well-known 'hand signal' example, where the situation of an employee driving a truck and giving a misleading hand signal would not be conduct within the scope of the section, while driving a truck with misleading advertising on it would be conduct falling within the scope of the section.[151]

The language of trading or commercial character has a broad application to the definition of 'trade or commerce' in the *CCA*. For instance, it has been applied to interpret the definition of 'trade or commerce' in s 4(1) of the *CCA*.[152]

Applying this interpretation to whether conduct is 'in trade or commerce' creates some difficulty as it requires a finding of fact as to whether conduct is within or beyond a 'dividing line' to determine the issue.[153] Certain conduct may be on the 'dividing line' itself. For instance, the Full Federal Court in *Village Building Co Ltd v Canberra International Airport Pty Ltd* noted this is a particular issue where representations are made by a corporation to an employee in connection with the employee's terms of employment, with authorities differing as to whether such representations are 'in trade or commerce'.[154]

In a subsequent High Court decision, *Houghton v Arms,* the approach in *Concrete Constructions* was endorsed by the majority.[155] The majority there also endorsed the view of Toohey J in *Concrete Constructions* that determining whether conduct was 'in trade or commerce' would in most cases focus 'on the nature of the business of the party making the representation'.[156] However, 'statements made by a person not himself or herself engaged in trade or commerce' may too amount to conduct 'in trade or commerce' where certain conduct is intended to be induced by those representations.[157] In effect, this leads to the position that statements do not need to be made by persons

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150 Ibid 604 (emphasis added).

151 Ibid.

152 *Obeid v Australian Competition and Consumer Commission* (2014) 226 FCR 471, 483 [37].

153 The Full Court of the Federal Court in *Village Building Co Ltd* (2004) 139 FCR 330, 340 [48] discussed *Concrete Constructions* and said that:

> the 'dividing line' between conduct that is or is not in trade or commerce, according to the narrower construction of s 52 of the [*TPA*], may be difficult to draw. However, once the narrower construction of s 52 was adopted, the facts of *Concrete Constructions* clearly fell outside s 52. Other fact situations will be much closer to the line.

154 Ibid 340–1 [49].

155 *Houghton* (2006) 225 CLR 553, 565 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

156 Ibid 565 [34].

157 For instance, the Court found that:

> statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if, for example, they are designed to encourage others to invest, or to continue investments, in a particular trading entity.

Ibid 565 [34] (footnote omitted).

in business to be 'in trade or commerce' to risk contravention of the *CCA* provisions.

These decisions suggest that the scope of the words 'in trade or commerce' have such breadth that, if ss 2A, 2B and 2BA were to be amended as recommended, representations made by government would be 'in trade or commerce' if the representations had a 'trading or commercial character', despite the government not 'carrying on a business' in that particular field. This interpretation could have significant implications for government given, for example, the raft of publications which it releases, and which may bear a 'trading or commercial character'. The ACCC specifically endorsed the *Houghton v Arms* approach applying to government if Recommendation 24 were introduced.[158]

The interaction between 'in trade or commerce' and 'carries on a business'

The effect of the proposed amendment from 'carries on a business' to 'in trade or commerce' itself has been the subject of judicial exposition. For instance, Emmett J in *JS McMillan* found that the claimed contravening conduct concerning the sale of the AGPS was 'in trade or commerce' but fell short of conduct 'carrying on a business' due to the broader scope of conduct captured by the words 'in trade or commerce', noting similar findings in other cases.[159] This is the type of conduct which *NT Power* did not expand the *CCA* to cover. If ss 2A, 2B and 2BA are amended, then conduct 'in trade or commerce' may include irregular procurement and supply by government and one-off transactions, a broader scope of activity than that encompassed by determining whether government is 'carrying on a business'. Other cases involving sales of businesses have been found to fall within 'in trade or commerce'. In *Bevanere Pty Ltd v Lubidineuse,*[160] it was argued by the vendor that the sale of a beauty salon business, its one capital asset, where the corporation was not engaged in the buying and selling of such capital assets, was not conduct 'in trade or commerce'. The Full Federal Court stated that the issue needed to be considered in the context of the facts surrounding the sale, and noted that the goodwill and stock of the business were sold and an agent engaged to find a buyer. The business was sold as a going concern, complete with a non-compete covenant over the vendor within a radius of 5 kilometres for 3 years. The Full Court characterised the sale as part of the vendor's commercial activities, stating: 'The mere fact that it was the sale of a capital asset did not deprive it of its character as a transaction in trade or commerce.'[161]

The sale of a farm was also 'in trade or commerce' in *Morton v Black* as the conduct of farming was in trade or commerce.[162] This does not mean,

158 ACCC, Submission to Competition Policy Review — Response to the Draft Report, above n 116, 33 [2.2] n 34.

159 *JS McMillan* (1997) 77 FCR 337, 354, citing *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330 and *Morton v Black* (1988) 83 ALR 182.

160 (1985) 7 FCR 325.

161 Ibid 329–30.

162 (1988) 83 ALR 182.

however, that all asset or sales are 'in trade or commerce'. In *O'Brien v Smolonogov*, for example, a sale of vacant land which had not been used for business activity was held to fall outside 'trade or commerce'.[163]

Thus the proposed change would remedy a current gap in the application of the *CCA*, but an amendment in these terms would also pose a number of issues.

First, it is unclear which definition of 'in trade or commerce' would be applied to ss 2A, 2B or 2BA of the *CCA*. Based on the Harper Review's Final Report and the draft legislation that was included, it may be the broader definition that is specific to the *Constitution* or it may be that which the High Court upheld in *Concrete Constructions*, requiring that conduct be of a 'trading or commercial character'. The problem with this uncertainty is that, if the *Concrete Constructions* approach were applied to an 'in trade or commerce' amendment, then the scope of activity subject to the *CCA* may be narrowed from the present provision. The *Concrete Constructions* characterisation would mean that government activity would be required to have a 'trading or commercial character', arguably a higher threshold than that which applies under *NT Power* where if the activity of government is incidental to core conduct in which government 'carries on a business', then such conduct is subject to the *CCA*. The factual inquiry under the *Concrete Constructions* approach would require that the government business have a trading or commercial character based upon the nature of the conduct. There is now arguably a clear test for whether activity is governmental in character under the 'carrying on a business' test, which is answered as a question of law. However, this would be unwound. Instead, reliance would be placed on a factual characterisation of the activity as occurred in decisions prior to *NT Power*. Resorting to making a finding of fact, rather than reliance on a question of law, provides less clarity to private enterprise dealing with government as to whether dealings with government are subject to the *CCA*.

Second, if the *Concrete Constructions* approach to 'in trade or commerce' is applied to any amendment to ss 2A, 2B and 2BA, then based on *Houghton v Arms* it gives rise to government entities potentially being subject to the *CCA* where a representation bears a 'trading or commercial character' even if the government entity does not conduct trade or commerce in that same field. Such a construction of 'in trade or commerce' would have significant and detrimental consequences for government given the breadth of representations which government makes. Indeed, it could even impact upon political communications by Ministers speaking in their capacity as members of the Executive.

Whether this significant proposed amendment to ss 2A, 2B and 2BA, particularly given the uncertainty around the interpretation which will attach to the words, is warranted in order to capture conduct that otherwise fall outside of the scope of the *CCA* is questionable.

163 (1983) 53 ALR 107.

Part 5: The position in New Zealand — When the government 'engages in trade'

In New Zealand, both the competition statute, the *Commerce Act*, and the consumer protection legislation, the *Fair Trading Act*, apply to the Crown when the Crown 'engages in trade'.[164] Under both Acts, 'trade' is defined broadly as being:

> any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land ...

This definition clearly envisages procurement. The only penalties for contravention by the Crown are declarations by the High Court.[165] Actions against the Crown can be brought privately or by the competition regulator, the Commerce Commission.[166] While there have been cases under these provisions, it appears that there are limited cases concerning procurement.

Statutory interpretation of 'engages in trade'

New Zealand courts have adopted the interpretation of 'engages in trade' applied by the Commerce Commission in *Re New Zealand Medical Association*.[167] That decision considered the Commerce Commission's authorisation of an agreement between the Medical Association and the Minister in relation to the benefit payable to practitioners for child patient consultation. In that context, the Commission stated that 'the better view of "engages" is that it is necessary for the Crown to be carrying on trade'.[168] The Commission noted a distinction between conduct when 'carrying on trade' and conduct 'in the course of trade', stating that the latter occurred even when the Crown itself is not engaged in trade but was 'acting ... in relation to a series of activities involving trade'.[169] In contrast, 'carrying on trade' required that the Crown be acting in trade in a sufficiently commercial manner. By entering into the agreement, the Minister's 'actions may affect trade but he is not thereby acting "in trade"'. The conduct was therefore exempt from the operation of the *Commerce Act*.[170]

The Harper Review acknowledged that the leading judgment in New Zealand in determining whether the Crown 'engages in trade' remains that of Casey J in the Court of Appeal in *Glaxo New Zealand Ltd v*

164 See *Commerce Act 1986* (NZ) s 5(1); *Fair Trading Act 1986* (NZ) s 4(1).
165 See *Commerce Act 1986* (NZ) ss 5(2)–(4); *Fair Trading Act 1986* (NZ) s 4(2).
166 See *Commerce Act 1986* (NZ) s 6; *Fair Trading Act 1986* (NZ) s 5.
167 (1988) 7 NZAR 407. For the endorsement of the use of 'carrying on trade' in the context of 'engages in trade', see the judgment of Barker J in *Glaxo* [1991] 3 NZLR 129, 133.
168 *Re New Zealand Medical Association* (1988) 7 NZAR 407, 410.
169 Ibid.
170 Ibid; it should be noted that 'acting in trade' is often used interchangeably with 'carrying on trade', see, eg, *Chisholm v Auckland City Council* (Unreported, High Court of New Zealand, Chambers J, 19 December 2001) [178]; *Marina Holdings Ltd (in receivership) v Thames-Coromandel District Council* (Unreported, High Court of New Zealand, Abbott AJ, 6 September 2010) [50]–[53].

Attorney-General.[171] There, the Minister of Health made a decision under s 99 of the *Social Security Act 1964* (NZ) that pharmaceutical subsidies in respect of the appellant's drug Ceporex should only be paid when supplied to consumers by a hospital pharmacy, rather than at any pharmacy under a general prescription. The appellant claimed that refusing to extend the subsidy to all pharmacies amounted to use of dominant position in a market, a contravention of s 36 of the *Commerce Act*. The Court found that for the purposes of s 5(1) of the *Commerce Act*, even on the broadest definition of trade, the Minister was not 'undertaking' trade in these circumstances, as trade:

> reflects the idea of settled activity or enterprise. The fact that there is a procedure for reference to a specialist committee for advice, and incorporation of her decision ... does not convert the need for the Minister to make a series of separate decisions into 'an undertaking' within the definition of trade. Moreover, having regard to the overall tenor of that definition and the general purpose of the *Commerce Act*, we consider that this word is meant to cover activity of a commercial nature only. It is not apt to describe the regulatory action for welfare purposes expected ... under s 99.[172]

In the circumstances of setting the benefit and imposing conditions to provide adequate services, the Minister was found to be performing 'a social service role pursuant to the powers vested in him by the *Social Security Act*'.[173] This judgment means that the Crown 'engages in trade' when it is engaged in activity of a commercial and not a regulatory nature, as regulatory action which has commercial effects is not of a sufficiently commercial nature to constitute 'acting in trade'.[174] Drawing this distinction in its application has not been so simple. As has been stated by one commentator: 'Say it quickly and that sounds like a straight forward question ... However, like all cases, the facts matter.'[175] The approach of *Glaxo* has been frequently adopted by the courts, with some examples being:

- a change to a system of tendering for supply of private hospital beds was a decision where the government entity was 'engaged in trade' (claim under the *Commerce Act*);[176]
- a District Council admitted that it was bound by the 'in trade' provisions when it offered land for sale by tender, declined all

171 *Glaxo* [1991] 3 NZLR 129; Harper Review, above n 4, 282.

172 *Glaxo* [1991] 3 NZLR 129, 139–40.

173 See comments of the Commerce Commission with which both courts agreed: *Re New Zealand Medical Association* (1988) 1 NZBLC (Com) 104,369.

174 Matt Sumpter, Ben Hamlin and James Mellsop, *New Zealand Competition Law and Policy* (CCH, 2010) 1503.

175 David Blacktopp, 'Application of competition and consumer law to the Crown: the New Zealand perspective' (Paper presented at the ACCC/AER Regulatory Conference, 6 August 2015) 4–5 <http://www.comcom.govt.nz/the-commission/media-centre/speeches/acccaer-regulatory-conference-6-august-2015/>.

176 *New Zealand Private Hospital Association — Auckland Branch (Inc) v Northland Regional Health Authority* (Unreported, High Court of New Zealand, Blanchard J, 7 December 1994). This case was commenced in 1995 before the statutory exemption for hospitals from the *Commerce Act 1986* (NZ) was introduced.

tenders, and then negotiated a sale with another tenderer (who was an adjoining owner) (claim under the *Fair Trading Act*);[177]

- in a claim against Auckland City Council by a developer whose golf course project was terminally delayed by Council's attempted conversion of the site for septic disposal, Council was found not to be engaging 'in trade' as 'everything the council did it did in its capacity as a local authority with statutory responsibilities for public health' (*Fair Trading Act*);[178]
- a District Council refusing to allow lessees of council land to freehold their land was found not to be 'acting in trade' but rather under a 'policy at a broad level of abstraction well removed from day to day operational considerations' as the Council was a 'public authority exercising a statutory discretion or performing a public duty' (*Fair Trading Act*);[179]
- a District Council cancelling a building code compliance certificate (in a manner that was claimed to be akin to a private building certifier cancelling a building certificate), and allegedly causing damage to a property developer, was not 'acting in trade' but pursuant to its statutory responsibilities (*Fair Trading Act*);[180]
- the exclusion by the Ministry of Education of a company from a list of accredited providers of school management software, allegedly in breach of s 36 of the *Commerce Act,*[181] was not an act 'in trade' as the accreditation regime and small subsidies were 'the exercise of policy based regulatory functions'. Accreditation existed for the purpose of ensuring schools engaged software providers who met requisite standards;[182] and
- the *Commerce Act* did not apply to a case where two criminal defence lawyers objected to a policy change by the Legal Services Agency. The proposed change would result in the assignment of legally aided criminal defence work changing from one where an applicant would nominate their preferred lawyer from a panel, to a strictly rotational system of assignment of defence lawyers.[183] In this case, the Court applied *Glaxo* to find that:

> the public policy considerations surrounding the provision of quality legal assistance to those in need ... militate against the issues being seen in a 'trade' context for the purposes of the *Commerce Act*.[184]

In reaching this conclusion, the Court relied on the fact that:

177 *Gregory v Rangitikei District Council* [1995] 2 NZLR 208.
178 *Chisholm v Auckland City Council* [2002] NZRMA 362, 398.
179 *Arms v New Plymouth District Council* [2008] NZHC 684 (14 May 2008) [160].
180 *Marina Holdings Ltd (in rec) v Thames-Coromandel District Council* (2010) 12 NZCPR 277, 2 [50]–[57].
181 *Integrated Education Software Ltd v Attorney-General* [2012] NHZC 837 (30 April 2012).
182 Ibid [87]–[105].
183 *Clee v Attorney-General* (Unreported, High Court of New Zealand, Ellis J, 12 November 2010).
184 Ibid [84].

> The Agency does not have a profit-making requirement. And the obligations placed on the Agency to develop and apply listing criteria and subsequently to audit and monitor listed providers are plainly regulatory matters.[185]

These cases suggest that despite the *Commerce Act* and *Fair Trading Act* arguably being broader in their terms in the scope of application to the Crown than the current *CCA*, there are limited circumstances in which the s 5 definition will actually apply due to the very narrow definition courts in New Zealand have applied to 'engages in trade'. This shows the relatively limited application of the *Commerce Act* and *Fair Trading Act* to the Crown even before existing statutory exceptions are considered.[186]

In summary, NZ courts have given limited scope to the words 'engages in trade' in relation to the Crown. Whether the scope of government conduct subject to competition law in New Zealand is much wider than in Australia following *NT Power* appears doubtful, particularly given the decision in *Re New Zealand Medical Association*, that was applied in *Glaxo*, that draws a distinction between conduct that involves 'carrying on trade' and conduct 'in the course of trade'. Such a distinction means the wording may not capture conduct which is incidental to the conduct of a government 'business', unlike the position in Australia following *NT Power*. Whether the breadth of application of the *Commerce Act* and the *Fair Trading Act* includes procurement in practice is unclear.

Part 6: An evaluation of Recommendation 24

There has been a range of reactions to the proposed amendments to ss 2A, 2B and 2BA of the *CCA*.[187] For instance, one commentator has endorsed Recommendation 24 partly on the basis it would apply the misleading and deceptive and unconscionable conduct provisions of the *ACL* to the Commonwealth in procurement activities.[188]

However, given the issues we have raised in the potential construction of 'in trade or commerce', we take a less optimistic view of the utility of the proposed amendment. It is unclear what construction would be applied to the words 'trade or commerce' and, more importantly, it is unclear what additional conduct, beyond asset sales, of government would clearly be found to be subject to the *CCA*. The amendment would cause tremendous uncertainty and significant litigation. In addition, the amendment would displace 40 years of jurisprudence between the Swanson Committee and *Australian Competition and Consumer Commission v Baxter Healthcare*,[189] which has gradually

185 Ibid [78].

186 See *Commerce Act 1986* (NZ) s 43; cf *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 AC 344; *AstraZeneca Ltd v Commerce Commission* [2008] NZCA 479 (11 November 2008). Statutory exceptions arise when a specific enactment or regulation exempts conduct from the scope of the *Commerce Act*, an equivalent power to exempt as that which is available to State and Territory governments under *CCA* s 51(1).

187 See the discussion of views summarised in Griffiths, above n 74, 23.

188 Nick Seddon, 'Government exemption from competition and consumer law: Has Harper patched the holes?' (2015) 23 *Australian Journal of Competition and Consumer Law* 181, 184.

189 (2007) 232 CLR 1 ('*Baxter Healthcare*').

broadened the application of the *CCA* over time to establish the current post-*NT Power* position.

In light of this, we consider that the abandonment of Recommendation 24 in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) provides the Commonwealth with an opportunity to adopt an amendment which would more adequately cover gaps in the law and re-engage with State and Territory governments on this issue.

The amendment we propose is narrower, aimed at maintaining the existing jurisprudence but further expanding the definition of 'business' to include procurement and supply by government and one-off transactions (such as asset sales, restructurings, winding up and any dealings by government shareholders in the 'business') under ss 2A, 2B and 2BA. This is aimed at remedying the gap that *JS McMillan* identified and that the majority's judgment in *NT Power* maintained. While it is not entirely a novel remedy,[190] nor will it achieve a broad-brush application of the *CCA* to government which the ACCC advocated for in its submission to the Harper Review's draft report, it will extend the *CCA* to cover the issues which arise in procurement, supply, other commercial dealings (that is, leasing), privatisations, asset sales and winding up, which were the subject of the ACCC's submission to the Terms of Reference and Draft Report of the Harper Review.

There are several reasons why we make this recommendation. First, Commonwealth, State and Territory governments (to a more limited extent, local governments) are in the business of privatisation. For instance, the value of privatisation of government-owned businesses in Australia in constant dollar terms, between 1987 and 2012, amounted to $194 billion.[191] The Commonwealth allocated $3.3 billion in incentive payments to State and Territory governments to encourage further privatisation of assets as part of the Asset Recycling Initiative between 2014 and 2016.[192] While *JS McMillan* established that governments are unlikely to be carrying on a business in the course of an asset sale, privatisation or other one-off transaction, more than 2 decades have passed since that decision and it may now be argued that the position has, in fact, changed and that governments are in the business of privatisation and asset sales. If this view were adopted judicially, the *CCA* would apply to these transactions and dealings. This was the central concern of the ACCC in both its submission to the Terms of Reference and the Draft Report.

Additionally, while our proposed amendment may not capture government procurement when government is not carrying on a business, we note that such procurement by government is captured to an extensive degree by existing law. For instance, following *NT Power,* procurement where government 'carries on a business' (including where procurement is incidental

190 Dr Seddon made a similar suggestion in 2012 to amend the definition of 'business' in the *CCA* to specifically include procurement: Nick Seddon, 'Holes in Hilmer Re-visited: Government exemption from Australian competition and consumer law' (2012) 20 *Australian Journal of Competition and Consumer Law* 239, 248.

191 Malcolm Abbott and Bruce Cohen, 'A Survey of the Privatisation of Government-Owned Enterprises in Australia since the 1980s' (2014) 47 *Australian Economic Review* 432.

192 Commonwealth of Australia, *Commonwealth Budget 2016–17: Budget Paper No 2* (2016) 147.

to the business carried on) is generally subject to the *CCA*. However, there are a variety of other remedies available when contracting with government including administrative, contractual and statutory remedies.[193] Such an example is the Government Procurement (Judicial Review) Bill 2017 (Cth), introduced by the government, which will, if passed, provide a means for businesses to have recourse against the Commonwealth through enforcement of the *Commonwealth Procurement Rules* in either the Federal Court or Federal Circuit Court. While the requirements of the *Commonwealth Procurement Rules* do not provide equivalent rights nor impose equivalent obligations to those available under the *CCA*, they do provide general protections. For instance, while not encompassing the scope of *ACL* remedies, the Rules include a non-discrimination clause requiring that tenderers 'be treated equitably based on their commercial, legal, technical and financial abilities'.[194] Passage of the Bill, a key recommendation of the 2014 Senate Committee report discussed earlier,[195] would provide parties contracting with the Commonwealth additional remedies relating to procurement.

We also propose this narrower amendment because we consider that an overly wide application of the *CCA* to government is not necessarily in the best interests of Australian consumers and that there are circumstances in which government should retain a right to exempt certain functions of government on public interest grounds (provided it does so by a sufficiently precise law or regulation). The Hilmer Report identified such circumstances as being where:

- 'market failure' occurs in a market or economic activity, which the Hilmer Committee noted typically arose in unusual circumstances where there were certain information exchange problems in markets or monopoly power on one side of a transaction warranted the use of countervailing market power; or
- certain valued social objectives may not be achieved in competitive markets despite those markets being efficient, for instance provision of special benefits may accord with 'community values' despite diminishing economic efficiency.[196]

Given that the above circumstances can arise across a variety of instances of procurement or supply of goods or services, government should continue to exercise some discretion as to the circumstances in which the *CCA* applies. The decision in *RP Data* illustrates the benefits to consumers that can arise when certain conduct of government is exempt from the *CCA*. In that case, retail consumers received the benefit of a statutory provision requiring flat pricing at regulated rates for access to real property data. The statutory requirement was found to accord with a governmental purpose and the supply

193 For a summary of such remedies, see G A Flick, 'Integrity in Government Tendering Processes: Means of Review' (1998) 14 *Building and Construction Law* 13.

194 The clause goes on to state that tenderers 'not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services': Department of Finance, *Commonwealth Procurement Rules: Achieving value for money* (1 March 2017) cl 5.3.

195 Senate Finance and Public Administration References Committee, above n 112, Recommendation 11.

196 Hilmer Report, above n 28, 88.

was found not to amount to government carrying on a business. In contrast, wholesale use of data was found to be a commercial supply subject to the *TPA* on the basis that there was a discretion in the sale and pricing of such data under the statute. The case indicates that where a sufficiently governmental purpose will be made out, then government will be found not to be carrying on a business.

The decision in *RP Data* serves as a model of potential legislative drafting, as the outcome delivered in that case facilitated government addressing either market failure or certain valued social objectives through the imposition of a specific statutory obligation (establishing a governmental purpose in relation to the supply of data to retail users), without which government would otherwise have been carrying on a business. However, the supply of wholesale data on commercial terms was subject to the *CCA* as the State was permitted to exercise discretion over pricing and supply of such data (terms that a commercial party would typically negotiate). We are of the view that there should be circumstances in which government conduct can be exempted from the broad application of the *CCA* to government and this can be achieved by express statutory language for certainty in the relevant legislation. Importantly, this approach also reflects recent jurisprudence which has established that only by a law enacted by Parliament, or by a regulation or direction imposed by a Minister acting lawfully under an enactment, will a sufficient governmental purpose be established so as to connote that government was not carrying on business. This approach, determining whether government carries on a business as a question of law, guards against circumstances where members of the Executive may act invidiously in commercial dealings and claim Crown immunity, as such conduct must be lawful under an enactment.

A key rationale for Recommendation 24, in the context of the Harper Review's recommendations, was the finding in the Final Report that there should be broader privatisation of government services, specifically human services, and there was a need to ensure that private suppliers of those services, engaged by government, had remedies against government. In this context, first, it is important to note that consumers of those services may have remedies against those service providers (rather than government) as there may not be an entitlement to derivative immunity.[197] Second, contracted providers of such services to government will have a range of other remedies against the Crown (beyond those available under the *CCA*) available in any event. Such remedies may include contractual or administrative remedies, and potentially extend to the exercise of statutory rights (such as those available under the Government Procurement (Judicial Review) Bill 2017 (Cth) once enacted). In these circumstances, the merits of extending the *CCA* may be more limited than anticipated.

The importance of the approach we adopt is that it addresses squarely the recommendation of the Hilmer Report that the *CCA* apply to government 'in so far as the Crown in question carries on business or engages ... in

197 Whether a claim for derivative immunity will be available depends on the particular legal and factual circumstances: see *Baxter Healthcare* (2007) 232 CLR 1.

competition (actual or potential) with other businesses'.[198] The words 'actual or potential' indicate that the intention of the original recommendation of the Hilmer Report applying the *CCA* to government was broader than merely capturing government activity when carrying on a business. On this basis, we submit that the preferred course to expand the scope of activity subject to the *CCA* to include restructures, privatisations and other dealings in assets by government is through limited but clear statutory amendment. Such an amendment will deliver a solution which is fit-for-purpose, to use the words of the Harper Review.[199] It is preferable to deliver business certainty (and mitigate sovereign risk for private investors and tenderers dealing with government) with a narrow, limited amendment rather than leave the meaning of 'carries on a business' in ss 2A, 2B and 2BA of the *CCA* to continue to be tested and developed in the courts on a factual basis (which may lead to issues such as retrospective application of the *CCA*).

We accept that obtaining the necessary agreement of all States and Territories to such amendment may prove difficult, but it is to be preferred to the alternative courses.

Conclusion

What emerges from the foregoing is that the merits of substituting 'carries on a business' for 'in trade or commerce' are mixed at best and detrimental at worst. While there remain concerns that an insufficient amount of government conduct is subject to the *CCA*, the decision in *NT Power* clearly expanded the scope of what conduct would be conduct where government 'carries on a business' and this has since been reflected in first instance and appellate judgments. It is difficult to reach a conclusive position on the post-*NT Power* jurisprudence as only one case, *RP Data*, has had final judgment delivered.

In light of this mixed body of jurisprudence, we nominate a narrow amendment specifically targeted at the gap in existing law. To expand the scope of 'carries on a business' to include procurement, supply and one-off transactions would progress the law and achieve the objectives sought by the ACCC, without the uncertainty that Recommendation 24's 'in trade or commerce' amendment would deliver. This proposal is more circumspect but one which will provide significant reforms and efficiencies to the manner in which government intervenes in demand and supply in the economy.

198 Hilmer Report, above n 28, 121–2.
199 Harper Review, above n 4, 9.